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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 446

AMBASSADOR, INC., WASHINGTON-ANNAPOLIS HOTEL COMPANY, DAVID A. BAER and ROBERT O. SCHOLZ, a Partnership, *et al.*, *Appellants*,

v.

UNITED STATES OF AMERICA, AMERICAN TELEPHONE & TELEGRAPH COMPANY, *et al.*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANTS

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March 8, 1945.

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I

As to the Facts

The briefs for both the Government and the telephone company* accept generally the statements of fact contained in the main brief for the hotels. There is no dispute concerning what may be called the physical facts. The controversy is as to the inferences to be drawn therefrom and then as to their legal effect. Counsel for the telephone

* In this reply brief, as in appellants' main brief, the American Telephone & Telegraph Company and the Chesapeake and Potomac Telephone Company will be referred to collectively as "the telephone company." Figures in straight type refer to the Government's brief and figures in italics to the brief for the telephone company.

company, however, take exception (*Br. 3*) to our reference to the hotels as "procuring" equipment from the telephone company and "furnishing" telephone facilities so procured to their guests. It is asserted for the telephone company that its equipment "is not rented to the hotels" and that "what the company furnishes and charges for is telephone service". Of course, we did not mean to imply that the hotels furnish the physical telephone instruments to their guests to take away with them, as distinguished from the convenience and accessibility to the telephone company's service which the telephone instruments, the PBX board and the internal wiring in the hotel make possible. Whether it is proper to say that the hotels "procure" the facilities from the telephone company is a matter of words rather than substance. The hotels, as part of the installations which guests expect in a modern hostelry, cause telephone instruments to be installed in their rooms and connected with the PBX boards which they obtain and operate. The hotels could procure such equipment elsewhere except for the regulation of the telephone company (R. 132) by which it refuses to make connection with equipment not obtained from it. Monthly charges are paid for the equipment. Certainly, despite the telephone company's plea that their monopoly equipment charges are for service, the transaction involved in obtaining equipment, has all the characteristics of rental. It is not the telephone company's choice whether any equipment is installed in a hotel, or how much. The equipment is ordered by the hotel. The telephone company does not come into the hotel to operate it. It is operated by employees of the hotels. The equipment may be used entirely for intra-hotel communication without any contact with the telephone company, and whether it is used at all for outside communication depends upon the will of the hotel. Moreover, even if the equipment is "furnished" and not "rented" to the hotels, this does not make what transpires within the hotels "service" by the telephone company. There can be no "service" without operators, and these are employed and directed by the hotels.

II

Reply to the Arguments of the Government and the Telephone Company

A. **The relationship between the hotels and the telephone company.**

The Government's brief makes it clear that this case is submitted by it on the basis that the relationship between the hotels and the telephone company is that of subscriber or patron and carrier. The Communications Commission in its report (R. 28), in searching for a ground for its claim of jurisdiction over the service charges of the hotels and of the application thereto of the Communications Act of 1934, as amended, suggested (R. 28) that there were three possible relationships which might exist between the hotels and the telephone company: (1) that the hotels were agents of the telephone company; (2) that they were connecting carriers; and (3) that the hotels were subscribers or patrons of the telephone company's service. The Commission expressly disclaimed any finding that the hotels were connecting carriers (R. 30). It found that they were agents of the telephone company (R. 29). It concluded, however, that its views would be met if the telephone company should file a tariff schedule in terms compatible only with a carrier-subscriber relationship (R. 30).

The lower court rejected the idea of agency and found that the hotels were subscribers to the telephone company's service (R. 52, 63). No error has been assigned to that finding. The Government, in its brief, now states (p. 28):

> "No contention is made in this case that appellants are 'connecting carriers' within the meaning of the Act; and we accept for present purposes the finding of the court below (R. 63) that in extending interstate and foreign telephone service to their guests they are not acting as the agents of the telephone companies."

The position of the telephone company is similar (*Br. 3*).

The question here, therefore, is whether, when the relationship is that of carrier and subscriber, a tariff schedule by which the carrier attempts to impose on the subscriber a condition such as that involved here, is a schedule required by Section 203(a) to be filed with the Commission, is valid and may be enforced in an action under Section 401.

B. **Since the hotels are subscribers and perform their services as such and not as connecting carriers nor as agents of the telephone company, the Government's argument that such services may in part come within the statutory definition of "wire communication" does not establish the validity and enforceability of the tariff schedule.**

The Government (Br. 9-10, 14-15) maintains that the services which the hotels render to their guests and for which their service charges are made, are, at least in part, embraced within the statutory definition of "wire communication" (Section 153). However, the Government fails to explain how activities which may otherwise satisfy that definition come within the terms of the Act if they are the activities, not of a carrier but of a subscriber which is not a common carrier.

A large industry may own locomotives and cars or may rent them from a railroad. It may have an extensive track layout over which it moves cars loaded with goods throughout its plant or even for long distances. Its facilities and activities may thus come within the definitions of "transportation" and "railroad" contained in the Interstate Commerce Act (Section 1(3)(a), 54 Stat. L. 899). But since the industry is not a common carrier, the fact that its activities and facilities satisfy the definitions of "transportation" and "railroad" does not bring them within the scope of transportation subject to that Act nor permit or require that any charges which the industry may make to its patrons may be controlled by tariff schedules filed with the Inter-

state Commerce Commission, *United States* v. *Am. Tin Plate Co.*, 301 U. S. 402 (1936); *Penna. R. Co.* v. *P. U. Comm'n*, 298 U. S. 170 (1936); *Pennsylvania R. Co.* v. *M. McGirr's Sons Co.* (C. C. A. 2d, 1922), 287 Fed. 334; certiorari denied 262 U. S. 743.

The situation here is similar. This is a suit to enjoin an alleged violation of Section 203 of the Communications Act (R. 4). The entire Act makes it plain that its provisions concerning "wire communication", and especially Section 203, relate to the furnishing of "wire communication" by a "common carrier". Only a "common carrier" is required by Section 203 to file tariff schedules, and only such a carrier is prohibited from engaging in "wire communication" unless a schedule is filed and published. Only a carrier is prohibited from charging, demanding or collecting a greater, less or different compensation for such communication than that shown in its tariffs. The statute measures the Commission's jurisdiction, and since it regulates wire communication only by a common carrier or connecting carrier, it cannot, no matter how broad the definition of "wire communication" may be, regulate wire communication by a hotel which is conceded by the Government's brief (p. 28) to be neither a common nor connecting carrier.

Moreover, if the service which the hotels provide were deemed to constitute "wire communication" within the application and for the purposes of the Act, this would mean that the telephone company could be required to provide the service now rendered by the hotels and any businesses having PBX installations, such as offices, stores or industrial plants. This follows from Section 201(a) of the Act, which provides that it shall be the duty of every common carrier engaged in interstate or foreign communication by wire to furnish "such communication service upon reasonable request therefor". Such a result would probably not be satisfactory to any of the parties before this Court, but it would be more satisfactory to the hotels than being obliged to supply the service without reimbursement.

The telephone company's brief brings even more clearly into focus the essential issue here. On page 3 of its brief, counsel for the telephone company state of the hotels

> "that they are not common carriers, that they are not agents of the telephone companies, and that their surcharges are charges for hotel services and not charges for wire communication under the provisions of the Communications Act."

The question, therefore, is whether, by a tariff filed with the Commission the telephone company may control the charges of hotels which are not carriers for hotel services which are not wire communication subject to the Act. We submit that the answer must be in the negative.

C. The Government's appeal to policy does not sustain its position in the face of the language of the statute. Moreover, it is based upon unwarranted assumptions as to the purpose of the Communications Act and as to the administration of other regulatory statutes.

On page 16 of the Government's brief, it is argued that if appellants' contention were sustained

> "effective regulation of interstate and foreign telephone rates would be substantially impaired."

It is then said

> "Under appellants' theory, the Commission could prescribe rates on long distance calls to and from the PBX board, but neither the Commission nor any other agency charged with the regulation of telephone rates could prevent any amount of additional charges being assessed against the guest making or receiving the call."

But there is nothing astounding in this. The plain fact is that Congress has not given the Commission power to regulate the charges of hotels, nor is there anything in the

provisions of the Communications Act which would indicate a policy of so doing. Whether regulation of the hotel charges by the Act is desirable or not, the fact is that Congress has not attempted to regulate charges for services other than those of carriers. As Mr. Justice CARDOZO said in *Penna. R. Co.* v. *P. U. Comm'n;* 298 U. S. 170 (1936), at page 177:

> "If the concept of transportation is in need of expansion, it is for the legislative department of the government to determine how great the change shall be."

The Government's argument goes to the point that it is the policy of the Act that those who avail themselves of the telephone company's services must be controlled in what they do in connection therewith. We submit that this is not so and that in any event the language of the statute rather than the views of the Commission as to what public policy requires must control.

The purpose of the Act is to regulate the charges to be collected and received by telephone companies. What the customers or subscribers of the telephone company, who pay its tariff rates, may then do is left to the control or regulation of other agencies or of economic forces. The failure of Congress to regulate what hotels may charge while regulating the charges of telephone companies is perfectly logical. Hotels are not monopolies. Their prices are regulated by competition. The report of the Commission in Docket No. 6255 (R. 26), the brief of the telephone company (*p. 9*), and, to a lesser extent, the brief of the United States (p. 16) treat the situation as though the hotels had complete control of access to the use of the telephone by guests. This is a fundamental error in their approach to the problem. The hotels do not control access to the telephone. All the guest has to do is to go to the coin box telephone or other public telephones installed in the hotels which are regulated by the Washington tariff (R. 222) which provides that hotels cannot make surcharges for telephone messages from instruments accessible to the

general public. In that event the guest can not be denied access to the telephone. While the court below and the Commission expressed fears that the hotels, if not regulated, could resell interstate and foreign telephone service at any price they chose, it would be difficult, if not impossible, to imagine a hotel management so stupid as to voluntarily irritate its guests by grossly excessive charges. The only effect of this would be to drive the guest to the use of another hotel, which is the last thing the hotels desire. Moreover, there is no evidence or claim of any abuses or overcharges by the hotels.

In these days it has become a part of the hotel facilities which guests expect, like bellboy and valet service, that they shall be able to make telephone calls from their hotel rooms, receive calls there and receive a certain amount and kind of message and secretarial services. If messages are not correctly taken, it is the hotel and not the telephone company which is blamed by guests. The hotels can provide this service to their guests *as a part of their hotel installation and facilities,* only by renting equipment from the telephone company, employing operators, subscribing for toll service and paying the telephone company's tariff rates. We submit that when they do the latter, the language and purpose of the Act are satisfied and that fulfillment of that purpose does not extend the application of the statute to cover the manner in which the hotels reimburse themselves, the services which they provide, or the charges which they make to their guests.

The Commission and the Government's brief in supporting its position have proceeded on the erroneous assumption that the objective of regulating the charges of common carriers is defeated unless the regulation is extended to the charges made by the patrons of the common carriers. This has not been the view which has governed the administration of the Interstate Commerce Act. We recall the example cited in our main brief of the freight forwarder who buys railroad transportation and then resells transportation, adding something for his services,

where it has been held that the forwarder's charges are not subject to control by tariffs filed with the Interstate Commerce Commission. *Acme Fast Freight* v. *United States*, 30 F. Supp. 968 (1940), 309 U. S. 638.

At page 17 of its brief, the Government refers to cases involving the regulation of hotel charges by public utility commissions in the past. These decisions are entirely irrelevant because they arose under other statutes and were based on the theory that the hotels were acting as agents for the carrier. (See pages 65 and 66 of appellants' main brief.) Moreover, the opinions in some of these cases indicate that they were influenced largely by notions of public policy, such as those advanced by the Government here. Whether or not this was warranted under the various statutes involved in those cases, it is plain here that the Commission and the courts may not add to the action of Congress.

D. The Government finds support for its argument only by adding words to the language of the statute.

In appellants' main brief the point was made that the tariff schedule is not one required by Section 203 to be filed and observed since it attempts to regulate the charges of the hotels, which are not carriers, and in no way specifies or affects the charges collected or received by the telephone company. We pointed out that under the provisions of Section 203 the only tariff schedules which a carrier is required to file are such as specify or affect the charges of the carrier "for itself and its connecting carriers".

The Government, in its brief, terms this reference to the language of the statute "pedantic" and "inelastic" (Br. 19).

The fact is, however, that rather than being a "pedantic" or "inelastic" interpretation of the Act, the interpretation presented by the hotels is the only construction of the words possible without introducing new language into the section. The Commission's brief seeks in effect to add to the simple, precise words of the statute

"charges for itself and its connecting carriers",—words which are perfectly plain in their meaning, the further words "and for hotels, apartment houses and clubs." It is utterly illogical to state that the words "charges for itself" mean charges by the hotels for themselves. The two final sentences of this argument (pp. 19-20) assert that Section 203(a) requires the inclusion in filed schedules of all charges for the service of a carrier and connecting carriers, whether exacted by the carrier itself or "by others with its knowledge and acquiescence." It is argued from this that the charges fall within Section 203 "regardless of whether the hotels in imposing the charges do so for their own benefit or as agents for the carriers." The statute does not so provide, either expressly or even by remote implication.

Moreover, these assertions assume that the hotels' charges are "for such carrier's service and the service of its connecting carriers." This is contrary to the fact and inconsistent with the balance of the Government's argument and that of the telephone company, which properly recognize that the charges are for the hotels' services, and that the hotels are entitled to reimburse themselves for these services. Thus the Government contends (Br. 22) that there is no effort on its part to control the hotel business. It concedes the right of the hotels to recover

> "such expenses, secretarial or otherwise, as they may incur in making available to their guests the telephone companies' interstate and foreign telephone service."

It says that

> "* * * Such expenses may be recovered in any lawful manner which appeals to the business judgment of the hotels' managers. Whether the recovery is by means of increased room rates, by flat service charges on each guest, by fixed fees for each service rendered, are matters beyond the reach of the regulation and beyond the concern of the Commission."

We have demonstrated in our main brief the inequity of these methods suggested by the Commission. If the room

rates were increased, some guests who never use the telephone would be forced to bear a part of the expense attributable to those who use it extensively. Flat service charges to each guest and fixed fees for each service rendered would not be uniform, if uniformity is necessary, and would be just as contrary as the present charges to the tariff schedule here in issue, providing that

> "the use of the service by guests * * * shall not be made subject to any charge * * * in addition to the message toll charges of the Telephone Company as set forth in this tariff." (Tariff, R. 9, 38.)

The Government concedes that there is no objection from the standpoint of public policy to the hotels' reimbursing themselves for the services they render. Thus the case against the hotels is resolved into objection to the "manner which appeals to the business judgment of the hotels' managers" as the fairest way of obtaining reimbursement for their costs and compensation for their services.

It is submitted that without writing new language into the statute its provisions cannot be extended to apply to the method which a subscriber adopts to reimburse itself for the expense of services outside the scope of the Act.

E. Since the hotels' charges are for hotel services and not for wire communication subject to the Act, the attempt to control them by tariff and to enforce compliance therewith by an action under the Act cannot be defended on the ground that the schedule is valid regulation of the telephone company's charges or services.

Despite the fact that the amount which the telephone company receives for a toll charge is neither increased, decreased nor affected in any way by the tariff schedule here in issue, both the Government (Br. 20-21) and the telephone company (*Br.* 6-8) attempt to defend the schedule as a regulation in some way affecting the telephone company. None of the reasons given, however, brings the

regulation within the language of the statute as specifying or constituting a classification, practice or regulation affecting the *charges* of the telephone company "for itself and its connecting carriers", nor as a specification of charges for wire communication by a carrier subject to the Act.

The Government argues that the regulation is one "specifically affecting the telephone companies' own service" (Br. 20). But while this argument might lend support for the schedule if the Communications Act contained the much broader language found in Section 6 of the Interstate Commerce Act, providing that tariffs of railroads shall show not only charges but also "all privileges or facilities granted * * * and any rules or regulations which in any way * * * affect * * * the value of the service rendered", the argument does not have force under the language of the present statute, which clearly confines the concern of Congress to regulations affecting "charges" of the telephone company.

The telephone company defends the regulation on the ground that it "affects the telephone companies in their business." The argument is that if the hotels made too high a charge this would deter the hotel guests from using the telephones in their rooms. An equal deterrent would be provided, however, if the hotels so increased their room rates as to discourage patronage or if they made a flat fee or service charge, all of which the Government concedes to be proper. The reference in Section 203 to regulations "affecting such charges" certainly does not mean regulations affecting the volume of business done by the telephone company, but rather, the exact charges made for individual telephone calls.

The Government asserts further (Br. 20), that regulations "defining the rights, privileges and restrictions attaching to a particular type of service offered, are a commonplace of telephone tariffs * * * and form as proper a part of the tariff as does the schedule of charges itself." No analogy is furnished by the regulation of The Chesa-

peake and Potomac Telephone Company prohibiting hotels from making service charges "for messages from instruments 'accessible to the general public or to guests, tenants or members generally' ". That tariff involves only telephones accessible to the public. This case does not concern telephones accessible to the public. It relates to services and facilities provided by the hotels only for their guests. In our main brief we pointed out that it was conceivable that the telephone company might properly make certain regulations for the purpose of protecting its equipment, facilities and service. However, as we said, it does not follow that a regulation which is proper in this sense and which may give the carrier certain rights in relation to its subscribers, may be enforced by the Government in an action under Section 401, or that failure to observe such regulations, even if published in a tariff, would constitute a violation of Section 203. It is only where a regulation affects the charges collected by the telephone company that failure to comply constitutes a violation of Section 203.

The telephone company cites two cases at page 8 of its brief—*1015 Chestnut Street Corp.* v. *Bell Telephone Co. of Pennsylvania,* PUR 1931A, 19, 7 PUR (NS) 184 (1930, 1934); *Budd* v. *Southwestern Bell Telephone Co.,* 28 PUR (NS) 235 (Mo. P. S. C., 1939), as support for its argument that regulation of the kind here in issue has been sustained by the State Commissions. The fact is, however, that in the decisions themselves the Commissions held that the factual situations offered no analogy to the situation with reference to regulating PBX telephone service to hotels. Moreover, the regulations referred to by the Commission and the telephone company are not similar in character to the regulation here in issue. For example, the telephone company's brief (*p. 8*) refers to a regulation which it states affects the subscribers in their business. The regulation referred to is one which limits the use of the telephone to the subscriber, his agents and representatives. However, that regulation appears only to apply

"where the service is on an unlimited flat rate basis." (R. 220). It is obvious that such a limitation would affect the charge for unlimited flat rate service, but the validity of such a limitation affords no analogy to a case involving a message rate. Furthermore, it is significant that no decision is cited holding that failure to observe the regulations referred to constitutes a violation of Section 203. We refer to the discussion at pages 28, 43, 48-54 of appellants' main brief.

F. This Court is not bound to accept the administrative action of the Commission as suggested by the Government.

The Government (Br. 23) seeks to distinguish the cases of *United States* v. *Am. Tin Plate Co.*, 301 U. S. 402; *Swift & Co.* v. *United States*, 316 U. S. 216; and *Acme Fast Freight* v. *United States*, 30 F. Supp. 968 (S. D. N. Y.), on the ground that they refer to matters before the Interstate Commerce Commission. Its plea that

> "there is obviously no such identity in the conditions and problems of the two industries as to call for the indiscriminate application of decisions in one field to cases arising in the other"

is obviously inconsistent with its own citation of the *Tin Plate Co.* case and other railroad cases later in its own brief (pp. 29, 31).

The Government then suggests (Br. 23) that consistently with "The deference shown by this Court" to the prior "factual determinations by the Interstate Commerce Commission", the Court here should not disregard "the comparable factual determination of the Federal Communications Commission in its specialized sphere."

There are several answers to this suggestion.

In the first place, the Government concedes (Br. 30) that the hotels are neither agents nor connecting carriers. This eliminates the necessity for a "factual determination" by

the Commission, and is indeed a rejection by the Government of the determination which the Commission made.

In the second place, this case involves a question of jurisdiction over the hotels as subscribers and in no other capacity. This is a question of law which depends solely on the interpretation of Section 203 of the Act and only upon the meaning of a few words of that section. Subdivision (a) of that section provides that every common carrier shall file schedules showing all charges for itself and its connecting carriers,

> "and showing the classifications, practices, and regulations affecting such charges."

There is no complex or intricate state of disputed facts to be submitted to an administrative body familiar with the practices involved. As the Government puts it (Br. 7) "there is no substantial dispute in the evidence."

G. The so-called submetering cases are distinguishable.

Both the Government (Br. 18) and the telephone company (*Br.* 8) *cite Lewis* v. *Potomac Electric Power Company*, 64 F. (2d) 701, and various other cases commonly called the submetering cases, having to do with the resale of electric current. In the *Lewis* case it was held that the Electric Power Company could refuse to sell current to an office building for resale by the latter to its tenants at higher rates than paid to the power company. The decision rested upon the court's view that a power company could refuse to furnish current for resale. In some of the submetering cases, for example, *Florida Power & Light Co.* v. *State*, 107 Fla. 317 (1932), the right of the power company to refuse to sell current to one intending to submeter and resell it was upheld upon the ground that the submetering buyer would become a competitor of the power company, which had the right to protect itself against such competition. Obviously, no such situation is present here. The telephone company furnishes telephone service to the hotels with express permission to make it available to their guests.

Moreover, it does not appear in the submetering cases that the office buildings or apartment houses rendered any services of their own or did more than resell the electric current supplied by the utility at higher rates than those paid by them.

The hotels obtain the telephone company's service for their guests at the exact charges paid by the hotels in accordance with the telephone company's tariff rates, but, even more important, they provide additional services. Their service charges do not represent a profit from the resale of the telephone company's service, but, instead are compensation for the additional services rendered by the hotels and reimbursement to them for their expense therefor. Apart from the decision below and that below in the New York case (No. 823), we know of no decision, in which it has been held that one who has himself performed services and incurred expense in the course of his own business, in making the services of a common carrier available to his own customers, is precluded from charging for his services and reimbursing himself for his expense. Certainly this has not been held with respect to freight forwarders, who stand in the relation of shippers to railroads and make railroad transportation available to their patrons by adding their own services of assembling and loading.

Finally, the submetering cases present an entirely different problem from that which is here before the Court, since in the submetering cases the power companies sought to deal directly with the individual consumers and the question involved was the right of a power company to refuse to sell current to a middleman when the power company did not wish to do so because it would thereby be prevented from dealing directly with the ultimate consumers. As the court said in the *Florida Power & Light Company* case (pp. 322-323), cited on page 8 of the telephone company's brief and on page 18 of the Government's brief:

> "A public utility company's right to fix its own rates also includes the right to so prescribe and enforce them that all the company's dealings will be with the real purchasers and users of its service, without submitting to the requirement of delivering its service through the medium of a third party over which the company would have no control."

It is not claimed by the telephone company here that it desires to have direct dealings with hotel guests and that the regulation involved is not designed to accomplish this result. It would obviously be utterly impossible for it to do so because the hotel guests are for the most part transients. The telephone company's service is available to guests only because the hotels have procured the necessary facilities and employees and because they arrange in each instance for the placement of calls for their guests. Under these circumstances the telephone company cannot assert that the regulation here in issue is justified on the principle supporting the regulations involved in the submetering cases.

The last two cases cited by the Government (Br. 18) in connection with submetering do not deal with that subject. The *Rogers* case said a business corporation could not sell surplus power which it generated for its own use, and the *New York Edison Company* case said that a business corporation which produced its own power and resold it to tenants could not compel the Edison Company to provide breakdown service for the tenants.

H. In the absence of a finding that the telephone company violated the statute and of an injunction against it, it was error to find a violation by the hotels and to enjoin them.

In our main brief, we urged that the prohibitions of Section 203 are directed only to common carriers and that unless there is a violation by the telephone company, no violation can be found to exist. We also urged that in view of

the language of Section 411, no decree could be issued against the hotels as subscribers unless there was a decree against the telephone company.

The Government took no appeal from the refusal of the lower court to enter a decree against the telephone company; it assigned no error to the finding of the lower court that "the telephone companies are not violating the tariff schedules at all" (R. 54); nor to the lower court's failure to find and conclude that there was any violation of Section 203 on the part of the telephone company. It is submitted that under these circumstances the Government is bound by the action of the lower court and may not properly now urge, as it does (Br. 34, 35), that the "finding that the telephone companies were not violating the regulation" is an "error of law which may and should be corrected by this Court", or that this Court should dispose of this case as though the lower court had found a violation by the telephone company and entered a decree against it. *Bolles* v. *Outing Company*, 175 U. S. 262 (1899); *Guardian Savings & Trust Co.* v. *Dillard* (C. C. A., 8th, 1926), 15 F. (2d) 996; *Morley Construction Co. et al.* v. *Maryland Casualty Co.*, 300 U. S. 185 (1937); rehearing denied 300 U. S. 687, 302 U. S. 779.

The last four decisions cited by the Government on page 35 of its brief do not support its position here. True they hold, as stated, that if a judgment below is proper on correct principles, it may stand regardless of an erroneous conclusion of law by the lower court. It does not follow, however, that if a finding of fact that the telephone company was violating Section 203 is necessary to support an injunction and no such finding was made by the lower court, this Court may dispose of the appeal on the assumption that there was such a finding. Neither does it follow that if our contention is correct that there may be no decree against the hotels except to the extent that a decree is entered against the telephone company, this Court may proceed upon the assumption that there was such a decree when none was entered by the lower court and no appeal was taken from its action. The Government's contention vio-

lates the principle stated in *Morley Construction Co. et al. v. Maryland Casualty Co., supra* (p. 191) that:

> "What he [an appellee] may not do in the absence of a cross-appeal is to 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.' *Ibid.* The rule is inveterate and certain."

Respectfully submitted,

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